



U.S. Department  
of Transportation  
**Federal Highway  
Administration**

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# Memorandum

**Subject:** Guidelines for the Fulfillment of Interagency Cooperation Under Section 7 of the Endangered Species Act

**Date:** JUL 16 1987

**From:** Director, Office of Environmental Policy  
Washington, D.C. 20590

**Reply to  
Attn. of:** HEV-20

**To:** Regional Federal Highway Administrators  
Regions 1-10  
Division Administrators  
Direct Federal Program Administrator (HDF-1)

The material attached incorporates the June 3, 1986, Final Rules for Interagency Cooperation under Section 7 of the Endangered Species Act with the guidance previously furnished by the Office of Environmental Policy.

The following documents have been superseded by the attached guidelines:

1. Memorandum to Regions dated July 6, 1978, "Final Rulemaking—Interagency Coordination Regulations of the Endangered Species Act of 1973;"
2. Letter dated January 31, 1979, from the Fish and Wildlife Service, "Requirements of the 1978 Amendments to the Endangered Species Act;"
3. FHWA Guidance dated April 30, 1979, on the 1978 amendments to the Act; and
4. Memorandum dated April 23, 1981, "Endangered Species Guidance."

Should you have any questions, please contact Mr. Larry Isaacson (FTS 366-9173) or Mr. Charles DesJardins (FTS 366-2068).



Ali F. Sevin

Attachment

**GUIDELINES**  
**FOR THE FULFILLMENT OF INTERAGENCY**  
**COOPERATION UNDER SECTION 7 OF**  
**ENDANGERED SPECIES ACT**

**ENVIRONMENTAL ANALYSIS DIVISION**  
**OFFICE OF ENVIRONMENTAL POLICY**  
**FEDERAL HIGHWAY ADMINISTRATION**

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**APPENDICES**

1. Final Rule on Interagency Cooperation—Endangered Species Act of 1973, as amended (50 CFR, Part 402)
2. Memorandum to Regions dated October 23, 1984, "Listing Endangered and Threatened Species and Designating Critical Habitat"
3. Memorandum to Regions dated March 12, 1985, "Rules for Applying for Endangered Species Act Exemptions"
4. FHWA Technical Advisory T6640.8 of February 24, 1982, "Guidance Material for the Preparation of Environmental Documents (pages 21-22 only)"
5. Memorandum to Regions dated November 3, 1986, "Final Rule for Implementing Section 7 of the Endangered Species Act"
6. Flowchart Procedures for Considering Project Impacts on Endangered Species
7. Fish and Wildlife Service/National Marine Fisheries Service Field Contacts

## I. PURPOSE:

This guidance describes the Section 7 requirements of the Endangered Species Act and its relation to the Federal highway program. On June 3, 1986, the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) issued a joint rule (50 CFR, Part 402) establishing the procedural regulations governing interagency cooperation under Section 7 (Appendix 1). This regulation is for the purpose of ensuring that actions are not taken to jeopardize the continued existence of endangered or threatened species or result in the destruction or adverse modification of the critical habitat of such species. The June 3 regulation supersedes the previous final rule issued on January 4, 1978.

## II. BACKGROUND:

### A. Legislation

The endangered species program is mandated by the Endangered Species Act of 1973 (P.L. 93-205). The Act is composed of 16 sections (Sections 2 - 17). The following paragraphs summarize the major elements of each of these sections.

Section 2 (Findings, Purposes, and Policy) mandates all Federal departments and agencies to conserve endangered species and to utilize their authorities in furthering the purposes of the Endangered Species Act.

Section 3 (Definitions) provides a number of key definitions, such as critical habitat, endangered species, take, and others.

Section 4 (Determination of Endangered Species and Threatened Species) provides the criteria for determining endangered and threatened species. This section also provides guidance on the procedure for listing species and directs the development of recovery plans (see Appendix 2 for current procedures). As of March 31, 1987, 376 species are protected in the U.S. and territories. Hawaii, California, and Florida are accountable for the highest percentage of protected species. Generally, the marine species protected are under the jurisdiction of NMFS, and the remaining species are under FWS jurisdiction.

Section 5 (Land Acquisition) indicates which funding authorities can be used for acquisition.

Section 6 (Cooperation with the States) provides numerous options for the FWS in their relationship with the States, such as:

1. obtaining information;
2. assisting in the development of a State program for protecting species;
3. providing financial assistance; etc.

**Section 7 (Interagency Cooperation)** is the key section which requires each Federal agency to ensure that its actions do not jeopardize the continued existence of any threatened or endangered species or adversely modify the habitat of such species.

**Section 8 (International Cooperation)** encourages foreign countries to develop programs to conserve fish and wildlife, including the protection of threatened and endangered species.

**Section 9 (Prohibited Acts)** provides direction on importation of protected species, species held in captivity or a controlled environment, import and export rules, and designation of ports-of-entry.

**Section 10 (Exceptions)** provides exemptions to the law; such as the hardship criteria, rules governing Alaska natives, and the exemption of certain antique articles.

**Section 11 (Penalties and Enforcement)** provides the criteria for civil and criminal penalties, district court jurisdictions, rewards for information, enforcement of the Act, and provisions for citizen suits.

**Section 12 (Endangered Plants)** provides a report to Congress on species of plants which are now or may become threatened or endangered (report has been provided to Congress).

**Section 13 (Conforming Amendments)** amends certain laws to be in conformance with the Endangered Species Act.

**Section 14 (Repealer)** repeals portions of the Endangered Species Conservation Act of 1969.

**Section 15 (Authorization of Appropriations)** authorizes monies to implement the Act.

**Section 16 (Effective Date)** indicates the effective date of the Act to be December 28, 1973.

**Section 17 (Marine Mammal Protection Act of 1972)** emphasizes that unless otherwise indicated, no provisions are to take precedence over these more restrictive, conflicting provisions of the Marine Mammal Protection Act of 1972.

## **B. Amendments**

The Endangered Species Act has been amended eight times, the latest being 1984. These amendments and their effects on the FFWA programs are listed as follows:

### **1. P.L. 94-325 of June 30, 1976**

No effect.

2. P.L. 94-359 of July 12, 1976  
No effect.
3. P.L. 95-212 of December 19, 1977  
No effect.
4. P.L. 95-632 of November 10, 1978
  - a. establishes an Endangered Species committee;
  - b. formalizes the process for issuing a biological opinion;
  - c. requires the preparation of a biological assessment, in appropriate instances; and
  - d. prohibits a Federal agency from making irreversible or irretrievable commitments of resources after the initial consultation.
5. P.L. 96-159 of December 28, 1979
  - a. modifies Section 7(a)(2) so that actions are not likely to jeopardize the continued existence of any of the endangered or threatened species to destroy or adversely modify the critical habitat of such species;
  - b. requires all Federal agencies to confer with the Secretary of the Interior; and
  - c. requires Federal agencies to use the available scientific and commercial data during formal consultation.
6. P.L. 96-246 of May 23, 1980  
No effect.
7. P.L. 97-304 of October 13, 1982
  - a. streamlines the listing process by reducing to 1 year the time period when final action on listing, delisting, and/or critical habitat proposals must be completed; and
  - b. implements changes in the exemption process by eliminating review boards and substituting the Secretary of the Interior as the authority responsible for threshold determination.
8. P.L. 98-327 of May 25, 1984  
No effect.

### **III. RESPONSIBILITY:**

#### **A. Applicability**

The Section 7 regulations are applicable to all actions that have discretionary Federal involvement or control. Each Federal agency must confer with the FWS on any action likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat. For listed and proposed species as well as designated and proposed critical habitat, a biological assessment is prepared to determine whether a formal consultation or a conference is necessary.

These procedures are required for major construction activities which are defined as a major Federal action significantly affecting the quality of the human environment, as referred to in the National Environmental Policy Act (NEPA).

For non-major Federal actions, the requirements of these regulations are in effect, however, the preparation of a biological assessment is not required. For each non-major Federal action, a determination of whether the action is likely to jeopardize the continued existence of a listed species or any critical habitat of a listed species should be made and documented. Thus, a letter to the FWS/NMFS requesting a species list or a letter to the FWS/NMFS indicating either "no listed species are in the project area" or presenting a list of species being reviewed initiates the coordination requirement.

#### **B. FHWA Role**

The FHWA shall perform the formal consultation procedures, but either the FHWA or the State highway agency (SHA) can perform the informal consultation process.

The Office of Environmental Policy maintains a complete accounting of proposed and listed species, including critical habitat information. This information may be obtained by calling (FTS 366-2068).

#### **C. State Highway Agency Role**

50 CFR, Part 402.08, allows a Federal agency to designate a non-Federal representative to conduct informal consultations or to prepare biological assessments. The FHWA has received written authorization from the FWS to allow SHAs to conduct informal consultations and to prepare biological assessments (Appendix 5). Written authority was not received from the NMFS, however, its agency representatives have indicated that the procedure agreed to by the FWS is satisfactory. However, the ultimate responsibility for compliance with Section 7 remains with FHWA.



#### D. The FWS/NMFS Role

The FWS and the NMFS are charged by Congress with the overall management of the Endangered Species Act and are jointly responsible for 50 CFR, Part 402—Interagency Cooperation. The NMFS is responsible for marine species, and the FWS is responsible for the remaining protected species. For species which spend a part of their life cycle in both fresh water and marine environment, an informal contact with either agency is recommended to obtain jurisdictional information. The appropriate field offices for the FWS and the NMFS are listed in Appendix 7.

### IV. PROCESS

#### A. Overview

There are three basic procedures: (1) informal consultation; (2) early consultation, and (3) formal consultation. Informal and early consultations are designated as optional processes and may be converted to the formal consultation procedure. Formal consultation is required to satisfy the requirements of Section 7 except in the preparation of a biological assessment (Appendix 4) or as a result of an informal consultation, both of which require a written concurrence from the FWS. The written concurrence should indicate that the proposed action is not likely to adversely affect a listed species or critical habitat. A flow diagram is attached (Appendix 6) which charts the formal and informal consultation process. Early consultation is not charted but closely parallels the formal consultation.

#### B. Informal Consultation

##### 1. The Procedure (Part 402.13)

The informal consultation process includes those steps necessary to determine whether or not formal consultation is required. In the vast majority of highway projects, Section 7 requirements will be met at the conclusion of informal consultation. If the SHA obtains written concurrence from either the FWS or the NMFS, agreeing that the action is not likely to adversely affect listed species or critical habitat, the FHWA is assured that the Section 7 requirements are complete. During this process, the FWS or the NMFS may suggest modifying the proposed action to avoid the likelihood of adverse effects to listed species or to critical habitat. The non-Federal representative (SHA) is encouraged to take the lead in this process if modification of the proposed action is necessary.

## 2. Relationship to Formal Consultation (Part 402.14(b))

As indicated in the previous section, the informal consultation procedure may complete the process, thus, the formal consultation process is not necessary. However, if the FWS or the NMFS indicates during the informal consultation process that the proposed action may affect a listed species or critical habitat, then formal consultation procedures must be followed unless the proposed project is modified so that "no effect" results. The FWS or the NMFS must then be informed of the change and concur. This completes the process, unless new species or new critical habitat is proposed before project completion. Then the informal consultation process may again be utilized.

## 3. Relationship to a Conference (Part 402.10)

A conference is a procedural step the Federal agency and the NMFS or the FWS take if a proposed species or proposed critical habitat are involved. The participation of the SHA is encouraged during the conference procedure. If any action is likely to jeopardize the continued existence of any proposed species or adversely modify proposed critical habitat, the FWS or the NMFS will, subsequent to a conference, make advisory recommendations on ways to minimize or avoid adverse effects. If the species are listed or the critical habitat is designated prior to completing the project, the FHWA must review the action to determine whether formal consultation is required. The criteria used to decide whether to proceed to a formal consultation are:

- a. significant new information about the species or critical habitat; or
- b. significant changes to the FHWA proposed action.

The conclusions reached at a conference shall be provided to the FHWA by either the FWS or the NMFS. This process may complete the endangered species requirements, unless either criteria listed above develops.

## C. Early Consultation

### 1. The Process (Part 402.11)

These procedures are intended primarily for private-sector applications for a Federal permit or license. The procedure is conducted between the FWS or the NMFS and the Federal agency responsible for issuing the permit or license. However, the prospective applicant should be involved throughout the consultation process. The procedures are essentially the same as the formal consultation but with minor changes in nomenclature.

## 2. Applicability

This process would not normally be used with Federal-aid procedures. The informal and/or formal consultation process would be most pertinent to the Federal-aid highway process.

## D. Formal Consultation

### 1. The Process (Part 402.14)

The formal consultation procedure follows the informal consultation discussed previously. This procedure begins when a Federal agency or the FWS/NMFS determines that an action is likely to affect listed species or critical habitat. A written request by the Federal agency to the FWS or the NMFS shall include items in Section 402.14(a). If the FWS or the NMFS requests consultation, the Federal agency shall submit the information given in Section 402.14(b) to the FWS or the NMFS, as appropriate. The preparation of the formal consultation information by the Federal agency shall be completed within 90 days with an option to extend an additional 60 days. The FWS or the NMFS shall render the biological opinion within 45 days on its analysis of formal consultation items in Section 402.14(c). The FWS or the NMFS may ask for additional data to make a biological opinion. The biological opinion shall result in either a "no jeopardy" opinion or a "jeopardy" opinion. The process is complete if a "no jeopardy" opinion is issued. If a "jeopardy" opinion is issued, the FHWA can either drop the project or accept the reasonable and prudent measures necessary to convert the "jeopardy" opinion to a "no jeopardy" opinion.

### 2. Exceptions - (Part 402.14b)

The endangered species process is complete prior to entering formal consultation, if:

- a. the biological assessment process or results of the informal consultation determines that the proposed action is not likely to adversely affect any listed species or critical habitat (A written notice of concurrence from the FWS or the NMFS must be received.); or
- b. a preliminary biological opinion, issued as a result of early consultation, is confirmed by the FWS or the NMFS as the final biological opinion.

### 3. Responsibility After Issuance of a Biological Opinion

If a "jeopardy" opinion is received by the FHWA, either the FWS or the NMFS, as appropriate, shall be notified, in writing,

of our final decision. If the FHWA agrees with the FWS's or the NMFS's recommendations, the process is complete. However, if the FHWA considers the recommendations to be unreasonable, the exemption process is the only option available for advancing the project.

#### 4. Exemption Process

The exemption process is found in 50 CFR, Part 450-453. The procedure for applying for an exemption is listed on sheets 4, 5, and 6 of the flow chart (Appendix 6). The FHWA has not utilized this procedure. There have been only two cases where an exemption was requested (Tellico Dam and Gray Rocks Dam)—neither were exempted.

#### 5. Reinitiation of Formal Consultation

Even though the Section 7 requirements are fulfilled, reinitiation of the formal consultation procedure may be necessary under certain conditions. The reinitiation process may be applied until construction is completed. Either the FHWA or the FWS or the NMFS may reinitiate the formal consultation. The reinitiation of the formal consultation should be considered when:

- a. new information changes the effect of the project on listed species or critical habitat not previously considered; or
- b. the construction project is modified such that it causes an effect to the listed species or critical habitat that was not considered in the biological opinion, or
- c. a new species is listed or a new critical habitat is established that may be affected by the construction project.

### V. SPECIAL CONCERNS

#### A. Candidate Species

For the first time, the term "candidate species" is officially embodied within regulation. The term has caused confusion when it appeared in letters from the FWS and the NMFS by implying legal protection. Paragraph 402.(d) clearly specifies the status of candidate species.

"Candidate species" refer to any species being considered by the the FWS or the NMFS for listing as endangered or threatened species but are not yet the subject of a proposed rule. Although candidate species have no legal status and are accorded no

protection under the Act, these species are receiving consideration by experts for possible listing in the future.

Nevertheless, these species should be identified in the public documents during the environmental process. Close contact should be maintained with the FWS or the NMFS on the disposition of the candidate species during the environmental processing of a project.

#### **B. Biological Assessment (Part 402.12)**

A biological assessment is the process which determines the potential effect a construction project will have upon listed and proposed species and designated and proposed critical habitat. The assessment may be accomplished by the non-Federal representation, but in all cases, it remains a Federal responsibility under the oversight of the FHWA. The biological assessment procedure is for the purpose of determining whether formal consultation or a conference is necessary or whether the endangered species requirements are fulfilled. The key steps in the biological assessment procedures are included on sheet 2 of the flow chart (Appendix 6).

#### **C. Permit Stage**

All Federal agencies responsible for issuing permits are also required to meet the mandates of the Endangered Species Act. In most cases, the endangered species process completed by the applicant during the environmental stage will suffice. However, especially if several years have lapsed after completion of the process, the SHA should screen the protected list for new species or correspond with the appropriate office of either the FWS or the NMFS. It is anticipated that in most cases the consultation process, completed during the EIS stage, will suffice.

### **VI. CONCLUSION**

In general, the FHWA has not found the requirements of Section 7 of the Endangered Species Act to be onerous. The two areas of difficulty encountered to date involved: (1) lack of sufficient scientific data by the FWS to support its recommendations; and (2) suggested alternatives (mitigation) that are not eligible for FHWA participation.

The guidance discussed in this paper is generally completed during the environmental process. Federal-aid is processed normally, as long as the requirements discussed previously are satisfied. Federal-aid will be delayed until requirements of the Endangered Species Act are met (see the flow chart in Appendix 6).